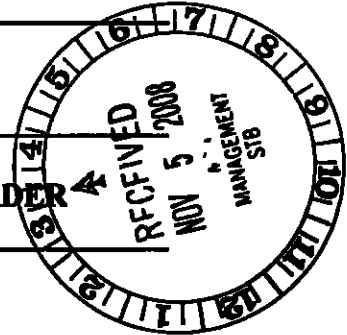


223906

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35164

PETITION OF BNSF FOR DECLARATORY ORDER



ENTERED
Office of Proceedings
NOV - 5 2008
Part of
Public Record

**KESSLER'S REPLY TO
BNSF'S SUPPLEMENTAL EVIDENCE**

1 Edwin Kessler ("Kessler"), herewith files Kessler's Reply to BNSF's Supplemental Evidence.

BACKGROUND INFORMATION

2. On October 2, 2008, the Surface Transportation Board ("Board") Instituted a Declaratory Order Proceeding in the above entitled case. In this Decision, the Board stated BNSF could submit Supplemental Evidence by October 17, 2008, and interested parties could submit replies by November 6, 2008. The Board directed the parties to focus on the issue of whether the proposed projects "would remove service to shippers and/or extend BNSF's operations into new territory."

3. Between MP 539.96 and MP 540.15 of the east-west Chickasha Line, referred to as the "Eastern Segment," BNSF proposes to.

A. "Relocate" the existing tracks 30 to 400 feet south of the existing alignment;

B. Remove three existing turnouts:

(i) The Turnout for the Mid-States Lumber spur;

(ii) The Turnout for the Producers Co-Op spur,

(iii) The turnout for the Shields Spur. [BNSF proposes to direct-connect the Chickasha Line to the Shields Spur, thereby severing the portion of the Chickasha line between MP 540.15 and MP 542.8, from the National Rail System. This proposed project was actually fully executed circa February, 2007, when the Shields Spur turnout was removed and the Chickasha line was direct-connected to the Shields Spur, thereby severing the Chickasha line west of MP 540.15 from the National Rail System. See Exhibit D of Gary Ridley's May 27, 2008 Verified Statement, appended to BNSF's Supplemental Evidence, which clearly shows (contrary to BNSF's counsel's statements falsely proclaiming the Shields Spur turnout is still in place) the Shields Spur turnout has already been removed, and shows several hundred feet of the Chickasha Line has been removed

C. Remove the two existing diamonds that permitted the Mid-States Lumber Co. and Producers Co-Op spurs to cross the adjacent Union Pacific line.

D. Construct new tracks that would connect Producers Co-Op and Mid-States Lumber Co. to BNSF's north-south Red Rock line.

4. Between MP 540.15 and MP 541.69 (located on the east side of S. McKinley Avenue), referred to as the "**Middle Segment**," BNSF proposes to permanently remove the tracks, abandon this rail corridor, then sell the rail corridor to the Oklahoma Department of Transportation ("**ODOT**").

5. In the months prior to the Board's **June 5, 2008** decision rejecting BNSF's NOE as void *ab initio*, the following salvaging activities occurred:

A The turnout that connected the Chickasha Line with the adjacent Union Pacific Line via a crossover track near MP 540.8, was removed, to facilitate construction of a culvert. This turnout has not been replaced. Removal of this turnout disconnected the middle segment of the Chickasha Line from the National Rail System.

- B The joint bars and other track connectors near Boardman's turnout near MP 541.75, were removed, and the rails were cut in several places.**
- C Approximately 15 feet of track was removed near MP 541.80, thereby disconnecting the portion of the Chickasha line that lies between MP 540.8 and 541.80, (and Boardman's spur) from the National Rail System.**
- D. A diamond that permitted the Packingtown Lead to cross the Chickasha Line near MP 542.8 (immediately west of where the Chickasha line crosses Agnew Avenue), was removed, as was an additional 60 feet or so of Chickasha line. Removal of the diamond and Chickasha line track on both sides of the former diamond, disconnected the portion of the Chickasha Line that lies to the east of MP 542.8, from the National Rail System.**
- E. A signal mast was installed on the west side of Agnew Avenue, in the middle of where the Chickasha track had been, thereby preventing passage on the Chickasha Line past this point.**

ARGUMENT

6 Eastern Segment. Based on the information provided by BNSF, it would appear that BNSF's proposed relocation of the Eastern Segment would not adversely affect the two shippers on this portion of the Line (Producers Co-Op and Mid-States Lumber Co.), since BNSF proposes to provide service to these two shippers via new track to be connected to BNSF's Red Rock line. This still leave three issues the Board needs to address:

- A. Does BNSF need Board authority to remove the two diamonds that carried the Mid-States Lumber and Producers Co-Op spurs over the adjacent Union Pacific Line? Kessler has previously argued that Board authority is needed, since diamonds are regulated under 49 U.S.C. §10901(d), rather than under 49 U.S.C. §10906 Kessler could find no prior precedent addressing this issue.**
- B. Does BNSF need Board authority to construct the new tracks that will service Producers Co-Op and Mid-States Lumber from BNSF's Red Rock line? BNSF has**

argued that this new track will not make it possible for BNSF to service new markets. Kessler has argued that the new track invokes transportation policy, since BNSF has not provided the Board with documentation demonstrating that a permanent irrevocable easement over Mid-States property has been obtained. Without a permanent irrevocable easement, service to Producers Co-Op could be terminated if Mid-States, or its successor in title, unilaterally terminated the easement across its property, thereby severing service to Producers Co-Op.

- C. If the Eastern Segment is relocated as proposed, it will no longer be connected to the Middle Segment at MP 540.15. Severing the Middle Segment from the National Rail System will forever foreclose using the Middle Segment for rail service, which means that the Middle Segment will be abandoned. Since a relocation may proceed without Board authority only if the proposed relocation would not impinge on a rail carrier's ability to provide service, the issue becomes: If the Eastern Segment is realigned, and is **not reconnected** to the Middle Segment at MP 540.15 after the realignment, will this affect BNSF's ability to provide rail service on the Middle Segment? Kessler has argued that if the realigned Eastern Segment is **not reconnected** to the Middle Segment at MP 540.15, then it will be impossible for BNSF to provide rail service on the Middle Segment, which obviously is the most extreme adverse impact possible on BNSF's ability to provide rail service on the Middle Segment.

7. Kessler would stipulate that if BNSF agreed to reconnect the Eastern Segment to the Middle Segment at MP 540.15 after the Eastern Segment has been realigned, then realignment of the Eastern Segment could proceed without Board authority. Conversely, if BNSF does not stipulate that the realigned Eastern Segment will be reconnected to the Middle Segment after the Eastern Segment has been realigned, then Kessler will continue to argue, BNSF needs Board authority to abandon / sever the connection of the Eastern Segment with the Middle Segment at MP 540.15.

8. **Middle Segment.** There can be no doubt, BNSF proposes to abandon the Middle Segment line of railroad. Unlike the Eastern Segment, where new tracks will be placed adjacent to existing tracks, BNSF does not propose to replace the existing Middle Segment tracks with new tracks. BNSF proposes to reroute all local and overhead traffic onto another existing line of railroad, the Packingtown Lead, which is located a mile south of the existing Middle Segment

9. BNSF's goal is to remove the existing right-of-way from the jurisdiction of the Board, then to convey title to that right-of-way to ODOT, which proposes to build a freeway on the right-of-way. Unlike the Eastern Segment, where the existing right-of-way will be replaced by a new right-of-way a few hundred feet south of the existing right-of-way, the Middle Segment right-of-way will be abandoned. While the Board does not have authority over how BNSF routes its traffic, it does have authority over the abandonment of rail corridors. If the Eastern Segment is relocated, the rail corridor will not be abandoned. If the Middle Segment is abandoned, this rail corridor will be abandoned, and service along this rail corridor will be forever precluded. If a future shipper were to obtain property adjacent to the Middle Segment, that future shipper could not obtain rail service. The Packingtown Lead is more than a mile south of this rail corridor. The Packingtown Lead is on the south side of the North Canadian River, while the Middle segment is on the north side of the North Canadian River. The record clearly shows that there is considerable privately owned property between the Middle Segment and the Packingtown Lead. Construction of a spur from the Packingtown Lead to the Middle Segment would constitute "new construction," since such a spur would enable BNSF to service additional markets (the area between the Packingtown Lead and the Middle Segment, which currently is not served by any rail carrier). Since the proposed action of BNSF would result in the Middle Segment rail corridor being removed from the jurisdiction of the Board, removal of this rail corridor from the National Rail System requires prior authority from the Board, and can only be accomplished pursuant to a properly filed Application, or Notice of Exemption.

THE MIDDLE SEGMENT IS PRESENTLY NEEDED FOR RAIL SERVICE

10 BNSF has represented to the Board that the Middle segment is not needed by BNSF or Stillwater Central for rail service, arguing that local and overhead BNSF and Stillwater Central traffic can be routed over the Packingtown Lead. Kessler has argued, since the Western Segment (between MP 541.69 and MP 542.91) has a shipper (Boardman), and since BNSF (or its authorized agent) has severed the Western Segment from the National Rail System by placing a double-steel-pole signal mast in the middle of the Western Segment tracks, where the Western Segment tracks connected to the National Rail System at MP 542.8, the only way BNSF can provide service to Boardman, is via the Middle Segment. Kessler argues, permitting BNSF to abandon the Middle Segment, would result in a "change in the service rendered by the applicant to the public." *Missouri Pac R Co Trustee Construction*, 282 I.C.C 388 (1952). As previously noted, Kessler consigned rail car HTTX 93507 to Boardman several months ago. Due

to BNSF's severing of the Western Segment at MP 540 8, at Agnew Avenue, the Middle Segment is presently needed, since the only way to access Boardman at this time, is via the Middle Segment

11. Appended to BNSF's Supplemental Evidence, is a Verified Statement of Gary M. Ridley, Director of ODOT. Attached to Mr. Ridley's Verified Statement, is Exhibit C, "Revised Financial Plan 2008 Update " On "Page 10 of 61" of Exhibit C, is a list of "I-40 Mainline Projects " The following pertinent language appears:

- A. **"Work Package 1.1C: Construct crossovers and switch UPRR to existing Chickasha Lead tracks west of Shields."**
- B. **"Work Package 1.2: ... Construct permanent UPRR mainline Sta 133+66 to 180+37 including railroad force account work . ."**
- C. **"Work Package 2.1: ... Construct UPRR permanent mainline tracks."**
- D. **"Work Package 3.4: ... Construct UPRR mainline including railroad force account work Move UPRR operations to new mainline tracks**

12. During the course of the proceeding in the U.S. District Court for the Western District of Oklahoma, Case No. 5:08-CV-00358-R, ODOT provided Kessler with a document that briefly noted the railroad related work associated with Work Packages 1 1C and 1.2, noted in ¶10, *supra* See the attached Exhibit A. The following language from that document is relevant in this proceeding:

- A. **"Work Package 1.1C is currently under construction, railroad related work to take place during this work package is as follows:**
 -)ODOT to acquire segment of rail (Chickasha alignment) that is left in place subject to the STB Abandonment action and allow for the UPRR to tie into each end from their current mainline rail alignment**
 -) While operating on the Chickasha alignment, the UPRR will remove and salvage the existing UPRR mainline from approximately Shields to**

approximately Classen Blvd (Emphasis added.)

B. Work Package 1.2 is scheduled to LET for bid from Nov. 08. Railroad related work to take place during this work package is as follows:

)UPRR to construct permanent rail alignment through the project extent. Estimated construction and operational date July / August 09.

)UPRR to remove all shoo fly and temporary tracks through the project extent. Including the chickasha shoo fly alignment. Estimated Construction date Oct / Nov 09.”

13 Work Packages 1.1 and 1.2 clearly state that the Middle Segment of the Chickasha Line is needed for continued rail service by the Union Pacific Railroad (“UPRR”). ODOT, UPRR and BNSF have known for some time that the Middle Segment will be needed for continued rail service by the UPRR, while the the Union Pacific line adjacent to the Middle Segment is salvaged, then realigned. (ODOT plans to salvage the portion of the UP line adjacent to the Middle Segment. ODOT further plans to install / construct new UP tracks approximately 30 feet north of, and 6 feet below, the existing alignment. While the UP tracks are out-of-service, the plan is to have UPRR use the Middle Segment of the Chickasha line for both overhead and local traffic.) The plans Kessler has reviewed indicate that new crossover tracks will be constructed connecting the UP line to the Chickasha line, in the vicinity of Shartel (Chickasha MP 540.8) and Shields Blvd (Chickasha MP 540.3). UP trains then would cross over to the Chickasha Line, operate on the Chickasha Line between MP 540 8 and 540.3, then cross back over to the UP line.

14 BNSF failed to disclose to the Board this plan to use the Middle Segment for overhead and local traffic by the UPRR. Kessler believes that this is another example of BNSF providing the Board with false and misleading statements. In its filings, BNSF was careful to state that the Middle Segment is not needed by BNSF or Stillwater for overhead traffic purposes. What BNSF failed to disclose to the Board, is that the Middle Segment is / will be needed by the UPRR for both overhead and local traffic purposes. And BNSF failed to disclose to the Board that UP’s mainline through Oklahoma City is a stub-ended mainline, and that UP does not have an alternate route it could use to access its east Oklahoma City rail yard.

15. Since BNSF’s own submissions to the Board clearly indicate that the Middle Segment will be needed for continued rail service by the UPRR for the next two years or so, Kessler

argues that the legal underpinnings justifying this Declaratory Order Proceeding, no longer exist.

16. Since the Middle Segment will be needed for continued rail service by the UPRR for the next two years or so, Kessler argues BNSF's own submissions to the Board gives the Board no option but to rule, BNSF's proposed "relocation" of the Middle Segment, would constitute an "abandonment," rather than a "relocation," and that Board authority is needed to implement this plan. In addition, since the Middle Segment will continue to be needed for continued rail service by the UPRR, abandonment would not comport with "public convenience and necessity."

17. **Boardman.** The Board intimated in its October 2, 2008 Decision, that Boardman had not participated in this proceeding. Kessler would point out that Boardman submitted a lengthy Verified Statement, which clearly spelled out Boardman's position. If Boardman were to submit any additional comments, BNSF is likely to Move to Strike those comments, arguing the additional comments are "redundant," citing 49 CFR 1104.8, just as BNSF did in its September 24, 2008 Motion to Strike.

THE MIDDLE SEGMENT IS NEEDED FOR FUTURE RAIL SERVICE

18. Five local municipalities, Norman, Shawnee, Chickasha, El Reno and Lawton, passed resolutions which stated:

- A. "[T]he historic and strategically valuable Union Station rail yard in Oklahoma City lies at the center of the state's unique railway network linking the state's major towns."
- B. "[T]he future of rail service in central Oklahoma depends upon having a hub that allows rapid and cost-effective development of a safe, convenient, fuel-efficient and environmentally friendly rail transit system for linking the economic engines of Oklahoma towns, cities and military bases;"
- C. "[A]ccommodation of the need for an intermodal transportation hub for the Oklahoma City metropolitan area located in downtown Oklahoma City and the need for highway replacement through downtown Oklahoma City can be met if the proposed alignment of the Crosstown Expressway be moved 400 feet south of the present planned alignment through the Union Station rail yard."

19. The Shawnee Economic Development Foundation, which represents the economic interests of private businesses in Shawnee, Oklahoma and the surrounding areas, approved a measure supporting the City of Shawnee's Resolution. In addition, the Shawnee Economic Development Foundation has given notice that it intends to participate as a party of record in this proceeding, and has provided the Board with comments stating that the Middle Segment "lies at the center of the state's unique railway network linking the state's major towns," that "the future of rail service in central Oklahoma depends upon having a hub that allows [for a] rail transit system for linking the economic engines of Oklahoma towns, cities and military bases," and that the "need for highway replacement through downtown Oklahoma City can be met if the proposed alignment of the Crosstown Expressway be moved 400 feet south of the present planned alignment through the union Station rail yard."

CONCLUSION

20 Kessler would not object if BNSF relocated the Eastern Segment south of its present alignment, **providing the realigned Eastern Segment is reconnected to the Middle Segment.**

21 Kessler will await the Board's decision regarding whether removal of a diamond requires prior Board authority, and regarding whether an easement must be permanent and irrevocable, when an easement is needed to cross private property to access a shipper (Producers Co-Op) from a different direction, when that shipper presently has unencumbered rail service.

22 In STB FD No. 33796, *Sacramento Regional Transit District – Petition for Declaratory order Regarding Carrier Status*, Served July 5, 2000, the Board stated.

"The replacement of an existing track with a substituted track **constructed nearby** is not subject to the prior approval requirement of 49 U.S.C. 10901"

23. BNSF **does not** propose to replace the existing Middle Segment with a new track "**constructed nearby.**" BNSF proposes to salvage the existing track, then reroute its traffic over another of its lines of railroad. Kessler argues that BNSF's proposed "relocation" of the Middle Segment, would result in the abandonment of a rail corridor, and consequently, prior Board authority must be secured. For the Board to rule otherwise, would open the door for rail carriers to abandon rail corridors without Board authority, merely by rerouting its traffic over other lines.

24. Kessler argues that the Middle Segment is presently needed for continued rail service, and that its removal from the National Rail System, would adversely affect BNSF's ability to provide local service to Boardman, and would adversely affect Union Pacific's ability to provide overhead and local service, during the two-year period of time UP's mainline is scheduled to be taken out-of-service.

25 WHEREFORE, for the foregoing reasons, Kessler asks that the Board:

A. Terminate this Declaratory Order Proceeding, as being improvidently instituted, since BNSF's admissions clearly show that the Middle Segment is, and will be for a number of additional years, be needed for continued rail service by the Union Pacific Railroad, while the UP's mainline through Oklahoma City is removed, then rebuilt in a different location.

B. Or in the alternative, Declare:

- i. Removal of a diamond requires prior Board approval.
- ii. Easements must be permanent and irrevocable when needed to provide service to a shipper that presently has unencumbered rail service.
- iii. BNSF may relocate the Eastern Segment only on the condition that BNSF connect the relocated Eastern Segment to the Middle Segment
- iv. Find that the Middle Segment is needed for continued rail service;
- v Find that removal of the Middle Segment from the National Rail System would adversely affect BNSF's ability to provide rail service to the public (Boardman, Inc.),
- vi Find that removal of the Middle Segment from the National Rail System would adversely affect Union Pacific's ability to provide rail service to the public in Oklahoma City, OK ;

vii. Find that removal of the Middle Segment from the National Rail System would adversely affect BNSF's / Stillwater's ability to provide rail service to the public in the future, since removal of the Middle Segment would remove the "hub" that "lies at the center of the state's unique railway network linking the state's major towns."

viii. And for such other relief as would be just and equitable.

25. I, Edwin Kessler, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Kessler's Reply to BNSF's Supplemental Evidence.

Executed on: November 4, 2008



Respectfully submitted,

Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2008, a copy of the foregoing Kessler's Reply to BNSF's Supplemental Evidence, was mailed by first class mail, postage prepaid, to Kristy Clark, BNSF Railway Company, 2500 Lou Menk Drive, Fort Worth, TX 76131-2828, and to Michael D. Clover, counsel for Shawnee Economic Development Foundation, 128 N. Broadway, Shawnee, OK 74801, and a copy was E-mailed to Fritz Kahn, 8th Floor, 1920 N Street, N W . Washington, DC 20036-1601, counsel for Bio-Energy Wellness Center and North American Transportation Institute.



Edwin Kessler

Work Package 1.1C is currently under construction, railroad related work to take place during this work package is as follows:

-) ODOT to acquire segment of rail (Chickasha alignment) that is left in place, subject to the STB Abandonment action and allow for the UPRR to tie into each end from their current mainline rail alignment— Estimated construction and operational date Aug/Sept 08
-) While operating on the Chickasha alignment, the UPRR will remove and salvage the existing UPRR mainline from approximately Shields to approximately Classen Blvd Estimated construction date Sept 08

Work Package 2.1, located west of Classen is scheduled to LET for bid between June and Sept. 08. Railroad related work to take place during this work package will construct temporary and ultimately permanent UPRR alignment from approx. west of Classen to approx. Pennsylvania.

Work Package 1.2 is scheduled to LET for bid from Nov. 08. Railroad related work to take place during this work package is as follows:

-) BNSF Railway Co to construct North Yard/Shields connection track to BNSF Red Rock Sub Div Estimated Construction date March/April 09
-) UPRR to construct permanent rail alignment through the project extent Estimated construction and operational date July/August 09
-) UPRR to remove all shoo-fly and temporary tracks through the project extent—Including the Chickasha shoo-fly alignment Estimated Construction date Oct/Nov 09

Work Package 3.2 is scheduled to LET for bid on Sept. 08. Railroad related work to take place during this work package will construct temporary and ultimately permanent UPRR alignment from approx. Pennsylvania west to end of project.